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No. 850.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE POMPEI WINERY, INC.,
Petitioner,

vs.

STATE OF OHIO BOARD OF LIQUOR CONTROL,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM SAXBE,
Attorney General,
S. NOEL MELVIN,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Respondent.

FRANK V. OPASKAR,
1005 Hippodrome Bldg., Cleveland 14, Ohio,
ANTHONY R. FROETTE,
1200 Williamson Bldg., Cleveland 14, Ohio,
Attorneys for Petitioner.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

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QUESTION PRESENTED

Whether a state, acting under its police power and the Twenty-first Amendment to the Constitution of the United States, can fix minimum prices at which wine may be sold in Ohio no matter where such wine is produced or bottled?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Twenty-first Amendment to the Constitution of the United States:

> "Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Section 4301.13, Revised Code of Ohio:

"The board of liquor control may adopt, promulgate, repeal, rescind, and amend rules and regulations to regulate the manner of dealing in and distributing and selling bottled wine within the state. The board may require out-of-state producers, shippers, bottlers, and holders of federal importers' permits shipping bottled wine into Ohio and holders of A-2, B-5, B-3, and B-2 permits issued by the department of liquor control, engaged in distributing and selling bottled wine in Ohio, to file with the department a schedule of prices in which minimum prices are set forth for the sale of bottled wine at wholesale or retail, or both, in Ohio. Any amendments, additions, alterations, or revisions to the schedule of prices as originally filed with the department shall be filed in the same manner as the original schedule of prices required to be filed with the department.

"The board may determine and fix the minimum mark-ups at wholesale or retail, or both, for bottled wine, and fix the minimum prices at which the various classes of bottled wine shall be distributed and sold in Ohio either at wholesale or retail, or both."

STATEMENT OF THE CASE

This cause originated before the Board of Liquor Control which imposed a fifteen (15) day suspension upon appellant's manufacturing, bottling and importing permits, among other charges, for selling wine on forty-one occasions to retail permit holders during August, 1954, at prices below the minimum fixed by the Board of Liquor Control under Article VII of Regulation 3 of said board, adopted pursuant to Section 4301.13, Revised Code, supra.

Pursuant to Section 119.13, Revised Code of Ohio, appellant appealed to the Court of Common Pleas of Franklin County, Ohio, which affirmed so much of the suspension as is now in issue and sustained the validity of the statute and regulation under consideration. Appellant then appealed

to the Court of Appeals of Franklin County, Ohio, which affirmed the lower court's judgment, and from there a motion to certify was allowed by the Supreme Court of Ohio which subsequently affirmed, on the merits, the judgment of the Court of Appeals.

ARGUMENT

Appellant approaches the federal question of the right of a state to impose minimum prices on the liquor industry as if it were new and novel. Nowhere has appellant alluded to the fact that this and every other court in the land has had many facets of this question before it and resolved them against appellant's contentions.

It would also be incredible that anyone could seriously raise these points without once referring to the Twenty-first Amendment to the United States Constitution, and the multitude of cases decided thereunder, were it not patently obvious that the questions presented are without real merit.

Appellant has neither attempted to distinguish its position from the settled law of the land nor pointed out wherein the Supreme Court of Ohio has violated some federal right. Rather than try to support the legal issue it presents appellant seeks to editorialize its position and obstinately ignore the pronouncements of this Court involving cases under the Twenty-first Amendment. Inasmuch as there is no meritorious legal question presented to which appellee can pointedly address this brief, and since it is realized that this Court is well aware of its own decisions which have been omitted by appellant, appellee will do no more than touch upon some of the landmark decisions since the repeal of prohibition in the remaining portion of this argument.

I

A State Can, Under Its Police Powers and the Twenty-first Amendment, Fix Minimum Prices at Which Wine is Sold by the Bottle No Matter Where Produced

With the adoption of the Twenty-first Amendment a new concept of constitutional limitations came into being. This was the principle that intoxicating liquors were no longer to receive the same constitutional protection as any other articles of commerce but were now within the exclusive hegemony of any state which desired to regulate or prohibit their use within its borders despite the situs of production. Thus it was that in *State Board of Equalization v. Young's Market Co.*, 299 U. S., 59, 81 L. ed., 38, it was held in 1936 that the Twenty-first Amendment abrogated the right of free importation under the commerce clause and the equal protection clause. Mr. Justice Brandeis further stated therein at 299 U. S., 64, 81 L. ed., 41:

> "* * * A classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth. * * *"

The above decision should effectively lay to rest all contentions of the appellant that a state legislature does not have the power to prevent cutthroat competition by minimum prices in order to reduce the intemperate use of wine. Two years after this decision, however, this Court went even further than it had in the above case when it held in *Wm. Mahoney v. Joseph Triner Corp.*, 304 U. S., 401, 82 L. ed., 1424, that discrimination between imported and local liquors is clearly permissible even though it is not reasonable, for the equal protection clause is inapplicable to intoxicating liquors. By the same reasoning this Court

has also held that retaliatory liquor laws do not offend against either the equal protection clause or the due process clause. *Indianapolis Brewing Co. v. Liquor Control Commission of Michigan*, 305 U. S., 391, 83 L. ed., 243; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S., 395, 83 L. ed., 246.

Following the above line of cases came the milestone decisions of *Ziffrin v. Reeves*, 308 U. S., 132, 84 L. ed., 128, and *Duckworth v. Arkansas*, 314 U. S., 390, 86 L. ed., 297, which were crystallized by the Court in *Carter v. Virginia*, 321 U. S., 131, 88 L. ed., 605, when it was held that the task of deciding what was reasonable regulation of liquor traffic was insurmountable due to diverse local conditions, and consequently the general constitutional policy is now to allow local rather than national authority prevail.

In this respect it is submitted that if Ohio wishes to attack the evils inherent in low priced wine by putting a floor or minimum price below which no wine may be sold within its borders, it has ample police powers upon which to predicate such regulation. This view has been reiterated by this Court many times and reaffirmed only two months ago in *Gordon v. Texas*, Memorandum Case No. 74, Vol. 2, L. ed. 2d, No. 6, Feb. 3, 1958.

II

No Substantial Federal Question is Presented

Initially it must be remembered that appellant is strictly a local bottler. Nowhere in the record is it contended that appellant sends its products outside a small area of northeastern Ohio. Likewise, nowhere in the record is it shown, nor in appellant's brief is it argued, that any other competitive wine can be sold at a price lower than that fixed by the Board of Liquor Control for all wholesalers and

bottlers irrespective of where such wine is produced or bottled.

It must further be remembered that the courts of Ohio have twice had occasion to pass on this statute and the regulation thereunder, and on both occasions no court expressed any doubt as to their validity and constitutionality. *Blackman v. Board of Liquor Control*, 95 Ohio App., 177, motion to certify denied, 158 Ohio St., 368; *Pompei Winery Co. v. Board of Liquor Control*, 167 Ohio St., 61.

Intoxicating liquor is not a unique field for minimum price control. Even without the sanction of the Twenty-first Amendment price fixing has been recognized in numerous other businesses by the courts of many states and this Supreme Court. Examples of this are: the price and weight of bread, *Mobile v. Yuille*, 3 Ala., 140; limitation on certain fees by attorneys, *Frisbie v. U. S.*, 157 U. S., 160, 39 L. ed., 657; rent control, *Block v. Hirsch*, 256 U. S., 135, 65 L. ed. 865, *Brown Holding Co. v. Feldman*, 256 U. S., 170, 65 L. ed., 877; minimum rates for contract carriers, *Stephenson v. Binford*, 287 U. S., 251, 77 L. ed., 288; and minimum wages for women and minors, *West Coast Hotel Co. v. Parrish*, 300 U. S., 379, 81 L. ed., 703.

Even appellant concedes at page 9 of its brief that the police powers of the states extend to these diverse subjects in fixing prices but despite this contends that a state cannot put a minimum price on wine. At this late date it would seem that no question could possibly remain unanswered as to the propriety and necessity of fixing a minimum price in an industry which has such a capacity for evil.

Unquestionably there is no substantial federal question presented by the appellant. The cases substantiating minimum price fixing are proliferous. No amount of extenuation on these principles could shed any more light on a state's police power under the Twenty-first Amendment

in relation to the due process and equal protection clauses than was done by Mr. Justice Frankfurter in his discussion of that Amendment and the commerce clause in *U. S. v. Frankfort Distilleries, Inc.*, 324 U. S., 293, at 300-301, 89 L. ed., 951, at 957:

> "The Twenty-first Amendment made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority. Before that Amendment—disregarding the interlude of the Eighteenth Amendment—alcohol was for constitutional purposes treated in the abstract as an article of commerce just like peanuts and potatoes. As a result, the power of the States to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause. The Twenty-first Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of State to control, and to control effectively, the traffic in liquor within its borders. The course of legal history which made necessary the Twenty-first Amendment in order to permit the States to control the liquor traffic, according to their notions of policy freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce, was summarized in my concurring opinion in Carter v. Virginia, 321 US 131, 139, 88 L ed 605, 612, 64 S Ct 464.
>
> "As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating liquors. Its barrier may be low, high, or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-

first Amendment. And so, the validity of a charge under the Sherman Law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. If a State for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cutthroat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. * * *"

CONCLUSION

It is respectfully submitted that the decision of the Ohio Supreme Court does not deny appellant any right guaranteed by the Constitution of the United States, that no substantial federal question is presented, and therefore that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM SAXBE,
Attorney General,
S. NOEL MELVIN,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Respondent.